

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ESAU ROGERS, JR.,

Defendant and Appellant.

D034303

(Super. Ct. No. CF6304)

APPEAL from a judgment of the Superior Court of Imperial County, Matias R. Contreras and Christopher W. Yeager, Judges. Affirmed with directions.

Defendant Esau Rogers, Jr. appeals his jury-tried convictions of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1));¹ possession of a firearm concealed within his vehicle (§ 12025, subd. (a)(1)); and receipt of stolen property (§ 496, subd. (a)). Rogers contends (1) the court erred in denying Rogers's motion to suppress evidence of the gun found in his vehicle during a search assertedly lacking the requisite

¹ All further statutory references are to the Penal Code unless otherwise specified.

probable cause; (2) the court abused its discretion in relying on the uncharged and unproven assertion that Rogers had fired the gun; (3) the court did not properly advise Rogers of his rights before Rogers admitted three prior convictions; (4) the court imposed a sentence assertedly without basis in any express true finding; (5) the court erred in not giving a certain jury instruction on mental state; (6) Rogers's conviction for possession of a firearm by a felon should be stricken as duplicating his conviction for possession of a firearm concealed in his vehicle; and (7) the sentence imposed was cruel and unusual punishment. Rogers also contends, and the People agree, that the abstract of judgment must be corrected to indicate that under section 654 the trial court stayed the sentence on his convictions for possession of a firearm concealed within his vehicle and receipt of stolen property. We affirm the judgment and direct the superior court to correct the abstract of judgment.

I

FACTUAL BACKGROUND

About 8:45 p.m. on January 4, 1999, two gunshots were fired in a Salton City neighborhood. A few moments later while standing by a blue and white pickup truck with a camper shell, which was parked near where the shots were fired, Rogers yelled obscenities and threatening words at somebody, including "All you M-F Whites, I will kill all of you." About 10 minutes after the gunshots, Rogers drove away in the truck. Neighbor Ramsey had someone call 911.

A few minutes later, Deputy Sheriff Fricke arrived at the shooting scene. While also approaching the shooting scene, Deputy Sheriff Pennington saw the blue and white

pickup truck with camper shell parked about three houses away from Ramsey's. As Pennington told Fricke about the truck, the truck drove away. Pennington followed and stopped the truck. Rogers complied, but instead of pulling over, stopped in the middle of the road. Rogers then emerged from the truck, left the driver's side door open and began walking toward Pennington's car. Pennington recognized Rogers because he had often seen Rogers driving that truck.

At Pennington's direction, Rogers raised his hands and walked backwards toward Pennington. Pennington handcuffed Rogers and asked if he had any weapons. Rogers said he had some knives. Pennington found a box knife and a butterfly knife in Rogers's pants pocket.

Meanwhile, Deputy Fricke had driven Ramsey to the scene where Pennington had stopped Rogers. Ramsey identified the truck as having left the shooting scene soon after the shots were fired. Since Pennington was responding to a report of shots, he believed a weapon might be in the truck. Pennington looked inside the truck through the opening where Rogers had left the driver's side door open. When Pennington bent down and leaned in, he saw what looked like a pistol under the seat. Pennington retrieved the item, a Jennings semiautomatic .22-caliber handgun with a spent shell in the chamber that had not ejected. The gun smelled as if it had been recently fired. The gun had been stolen in a burglary and its serial number filed off.

II

DISCUSSION

A

Court Properly Denied Rogers's Motion to Suppress Evidence Found in Search of Truck

Rogers contends the court should have granted his motion to suppress evidence of the gun found in his truck during the search by deputies who assertedly lacked probable cause to believe weapons were in the truck. However, on this record the court correctly denied Rogers's suppression motion since the deputies' search of the truck was proper.

The sheriff's department received a call about two persons arguing and shots being fired. When Deputy Fricke arrived at the shooting scene in response to the call, neighbor Ramsey told Fricke about hearing two people arguing and then a gunshot. Ramsey said one of the people involved was a Black male. Ramsey also said the people drove away in a blue and white Chevrolet pickup truck with a camper shell.

En route to the shooting scene, Deputy Pennington saw the truck parked nearby. After Pennington arrived at the shooting scene, he and Fricke saw the truck drive away. Pennington followed the truck. When Pennington eventually stopped the truck, Rogers, its driver, emerged from the truck and headed toward Pennington's car. Pennington drew his revolver and ordered Rogers to turn around, raise his hands and walk backwards toward Pennington. Pennington had Rogers kneel and then handcuffed him. When asked by Pennington if he had any weapons, Rogers said he had knives in his pocket. In searching Rogers's pocket, Pennington found a butterfly knife and a box cutter.

Meanwhile, Fricke arrived with Ramsey at the scene of the stop while Rogers, as instructed, was walking backwards toward Pennington. Speaking to Fricke, Ramsey identified the truck as having been at the shooting scene. After Rogers was secured in a patrol car, Fricke checked inside the truck for passengers but found none. Then, knowing that a gun remained unaccounted for, the deputies looked for it. Pennington found the gun under the truck's driver's seat.

"The search of a vehicle passenger compartment, limited to those areas where a weapon may be placed or hidden, is permissible if the officer possesses a reasonable belief the suspect is dangerous and may gain immediate control of weapons." (*People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1506, citing *Michigan v. Long* (1983) 463 U.S. 1032, 1049.) "[The] issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger." (*Brueckner*, at p. 1506.) At the scene where Pennington had stopped Rogers, the deputies were told by witness Ramsey that Rogers's truck had been seen at the shooting scene and had been driven away right after the shots were fired. Since the deputies had not found a gun on Rogers's person, they could reasonably believe the gun might be in the truck and then properly search the truck for purposes of their safety and that of others. (*Ibid.*) Contrary to Rogers's contention, a different result is not compelled simply because Rogers was handcuffed in the patrol car during the investigative stop and could not gain immediate access to the gun in the truck. (*Michigan v. Long, supra*, at p. 1051.) If Rogers had not been placed under arrest, he would have been allowed to go back to his truck where he would have had access to the gun and become an immediate threat to the

safety of the officers or others. (*Id.* at p. 1052 ["if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside"].) Further, knowing that gunshots had been fired, that Rogers's truck had driven away from the shooting scene and that no gun was found on driver Rogers, the deputies had probable cause to believe the gun was in the truck and to conduct a warrantless search of the truck. (*Illinois v. Gates* (1983) 462 U.S. 213, 238 ["we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations"]; *People v. Allen* (2000) 78 Cal.App.4th 445, 450.)

B

Rogers Waived Challenge to Sentencing Court's Asserted Fact-Specific Error

Rogers contends resentencing is required because in denying his *Romero*² motion to strike one or more of his prior convictions, the court purportedly abused its discretion by relying on an uncharged and unproven assertion that Rogers had fired the gun. However, by failing to object at sentencing to the court's asserted fact-specific error in misstating the evidence, Rogers has waived such claim of error. (*People v. Scott* (1994) 9 Cal.4th 331, 353, 355.)

The probation report indicated Rogers "fired a stolen weapon." At sentencing, the prosecutor effectively argued Rogers had fired the gun. However, although given the opportunity to object, Rogers said nothing about the matter of his firing the gun. The

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

court then stated Rogers fired the gun.³ Rogers again said nothing. In sum, at no time at sentencing or in any of his submitted papers bearing on sentencing did Rogers attempt to challenge the assertion that he had fired the gun. Accordingly, since Rogers was required to object to any error by the sentencing court in misstating the facts but did not do so, he has waived the issue for appeal. (*People v. Scott, supra*, 9 Cal.4th at pp. 353, 355.)

C

Rogers's Admissions of Prior Convictions Were Voluntary and Intelligent

After voir dire and before presentation of evidence, Rogers admitted he had prior convictions for burglary, robbery and possession of a firearm by a felon. Later, after presentation of evidence was completed, the court clarified with Rogers that he had also served prison sentences for each of those prior convictions and had not been out of prison for more than five years between any of them.

Rogers contends reversal is required because before Rogers admitted his prior convictions, the court did not properly advise him of his rights in accord with the requirements of *In re Yurko* (1974) 10 Cal.3d 857 (*Yurko*). Specifically, Rogers contends his admissions were defective as made without the court's having advised him of his right to confront witnesses and his right against self-incrimination. (*Id.* at p. 863.) Rogers also

³ Specifically, the court stated: "We examined the facts of this case. The jury found that the defendant not only was in possession of a firearm, but in so finding I believe found the facts to be true, that he had used that firearm, that a shot was fired, and that is certainly consistent with the state of the evidence when the weapon was found with a round jammed in the chamber indicating that it had been fired, and under the circumstances, then, not only do we have the possession, but dangerous use."

attacks the admissions as made without his explicit waivers of those rights. (*Ibid.*) However, on this record Rogers's admissions to his prior convictions were proper as voluntary and intelligent under the circumstances. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175 (*Howard*).)

In *Yurko, supra*, 10 Cal.3d 857, the Supreme Court held that "a defendant who admits the truth of an alleged prior conviction for purposes of a sentencing enhancement must be advised of, and waive, his rights to trial by jury, to confront his accusers, and to remain silent [*Boykin/Tahl*⁴ rights]." (*People v. Newman* (1999) 21 Cal.4th 413, 417-418, fn. 3, citing *Yurko, supra*, 10 Cal.3d at pp. 863-864.) However, in *Howard, supra*, 1 Cal.4th 1132, the Supreme Court held that *Yurko* error "should be reviewed under the test used to determine the validity of guilty pleas under the federal Constitution. Under that test, a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances. [Citations.] In the exercise of our supervisory powers, we shall continue to require that trial courts expressly advise defendants on the record of their *Boykin/Tahl* rights. However, errors in the articulation and waiver of those rights shall require the plea to be set aside only if the plea fails the federal test." (*Howard*, at p. 1175.) This record shows Rogers's admissions of prior convictions were voluntary and intelligent.

First, since the court advised Rogers of his right to a jury trial on his prior convictions and Rogers expressly waived his right to jury trial, he was manifestly aware

⁴ *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

of such right. Further, the record supports the reasonable inference that Rogers was also aware of his right to confront witnesses and his right against self-incrimination. Rogers admitted his prior convictions in the midst of a jury trial where it was plainly contemplated that the prosecution would be calling witnesses against him. Moreover, before admitting his prior convictions, Rogers had been present at the suppression hearing where witnesses were called and were cross-examined by his counsel. Those circumstances indicate Rogers knew of his right to confront witnesses. (*Howard, supra*, 1 Cal.4th at p. 1175.) Similarly, before making his admissions, Rogers was present during discussions about which of his priors the prosecution could use to impeach Rogers if he testified, a circumstance indicating Rogers knew of his right not to testify. (*Ibid.*) Further, before Rogers admitted his prior convictions, defense counsel acknowledged to the court that those prior convictions were "not truly at issue" and that after reviewing the available information, counsel believed they could be proven.⁵ Hence, Rogers has effectively conceded there was "a strong factual basis" for his admissions. (*Howard, supra*, 1 Cal.4th at p. 1180.) Accordingly, considering the totality of the relevant circumstances, we conclude Rogers's admissions of his prior convictions were proper as voluntary and intelligent.

⁵ Counsel also stated he "would rather concentrate on controverted issues in the trial."

D

Court Properly Based Sentence on Rogers's Admitted Prior Convictions

Rogers contends his sentence is void as assertedly not based upon any express findings by the court about his prior convictions. If, as contended by Rogers, the court imposed sentences on facts it never formally found to be true, Rogers had the duty to object. (*People v. Scott, supra*, 9 Cal.4th at pp. 353, 355.) By not doing so, Rogers has waived any claim of error on that point. (*Ibid.*) Further, since Rogers expressly admitted his prior convictions, the court was not required to make an independent determination of their validity. (*In re Candelario* (1970) 3 Cal.3d 702, 706.) Moreover, in any event, since the court expressly based Rogers's sentence on those prior convictions, the court necessarily found such prior convictions to be true.

E

No Reversible Instructional Error

The court instructed the jury: "In the crime charged in Count three, possession of stolen property, there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists, the crime to which it relates is not committed. [¶] . . . [¶] In the crime of possession of stolen property, the necessary mental state is knowledge the property is stolen." (See CALJIC No. 3.31.5.)

Rogers contends the court should have instructed the jury substantially in the language of CALJIC No. 3.31.5 on all counts instead of only on the receiving stolen property count. In particular, Rogers contends that by not giving the jury such instruction

on the two firearm possession counts, the court erroneously permitted the jury to find him guilty on those two counts regardless of his mental state. However, the record indicates that the court expressly instructed the jury that the elements of the crimes of possession of a firearm by a felon and possession of a concealed firearm in a vehicle required proof that Rogers had knowledge of the firearm's presence.

Specifically, the court instructed the jury: "The defendant is accused in count 1 of having violated section 12021 subdivision (a)(1) of the Penal Code, a crime. Every person who, having been previously convicted of a felony, owns or has in his possession or under his custody or control, any pistol, revolver, or other firearm is guilty of a violation of section 12021 subdivision (a)(1) of the Penal Code, a crime. In this case, the previous felony convictions have already been established by stipulation so no further proof of that fact is required. You must accept as true the existence of these previous felony convictions. [¶] There are two kinds of possession, actual possession and constructive possession. Actual possession requires that a person exercise direct physical control over a thing. Constructive possession does not require actual possession, but does require that a person *knowingly* exercise control over the thing or right to control a thing, either directly or through another person or persons. [¶] One person may have possession alone or two or more persons together may share actual or constructive possession. In order to prove this crime, each of the following elements must be proved: The defendant had in his possession or had under his control a firearm, and, two, the defendant had *knowledge* of the presence of the firearm." (See CALJIC No. 12.44, italics added.)

The court further instructed the jury: "The defendant is accused in count 2 of having violated section 12025 subdivision (a)(1) of the Penal Code, a crime. Every person previously convicted of a felony who carries concealed within a vehicle under his control or direction with *knowledge* of its presence, any pistol, revolver, or other firearm, capable of being concealed upon the person is guilty of a violation of Penal Code section 12025 subdivision (a), a crime. The conviction of a crime of burglary or robbery or felon in possession of a firearm in California is the conviction of a felony. [¶] In order to prove this crime, each of the following elements must be proved: One, the person previously convicted of a felony carried concealed within a vehicle under his control or direction a firearm. [¶] Two, defendant had *knowledge* of the presence of the firearm and, [¶] three, the firearm was capable of being concealed upon the person." (See CALJIC No. 12.46, italics added.)⁶

In sum, the court properly instructed the jury on the knowledge elements of the two firearm possession counts. On this record Rogers has not established any reversible judicial error with respect to the lack of instruction with CALJIC No. 3.31.5 on those counts.

⁶ The court also instructed the jury: "Knowingly defined: The word 'knowing' means with knowledge of the existence of the facts in question." (See CALJIC No. 1.21.)

Rogers Did Not Suffer Duplicate Convictions

Rogers contends his conviction for possession of a firearm by a felon must be stricken as assertedly duplicating his conviction for the purportedly necessarily included offense of possession of a firearm concealed in his vehicle. However, contrary to Rogers's contention, neither of those crimes is a necessarily included offense of the other. (*People v. Pearson* (1986) 42 Cal.3d 351, 355 ["The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense"].) Manifestly, a felon can commit the crime of possession of a firearm by a felon proscribed in section 12021, subdivision (a)(1) without possessing the firearm in a vehicle. Similarly, being a felon is not an element of the crime of possessing a concealed weapon within a vehicle proscribed in section 12025, subdivision (a)(1). (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [with respect to section 12025, "[t]he prior conviction referred to in subdivision (b)(1) is simply a sentencing factor which serves to elevate the offense from misdemeanor to felony; the prior conviction is not an element of the offense of carrying a concealed firearm within a vehicle proscribed in section 12025"].) Accordingly, Rogers has not established that his conviction for possession of a firearm by a felon must be stricken.

G

The Sentence Imposed Was Not Cruel and Unusual Punishment

Rogers admitted two serious felony priors within the meaning of the Three Strikes law (§ 667, subds. (b)-(i)), to wit, burglary (§ 459) and robbery (§ 211). The court sentenced Rogers to 25 years to life with possibility of parole for possession of a firearm by a felon plus one year each for two prison priors (§ 667.5, subd. (b)). The court stayed sentences of 25 years to life for possession of a firearm concealed within a vehicle and receipt of stolen property.

At oral argument, Rogers alerted this Court to *Andrade v. Attorney General* (9th Cir. 2001) 270 F.3d 743 (*Andrade*). Relying on *Andrade*, Rogers contends his sentence imposed under the Three Strikes law constituted cruel and unusual punishment under the federal constitution. However, we reject Rogers's contention.

In *People v. Ayon* (1996) 46 Cal.App.4th 385, we observed: "Recidivism in the commission of multiple felonies poses a manifest danger to society justifying the imposition of longer sentences for subsequent offenses." (*Id.* at p. 399.) We also observed: "Both in this jurisdiction and in other jurisdictions, habitual offender statutes have long withstood the constitutional claim of cruel and/or unusual punishment." (*Id.* at p. 397.) Rogers committed three current felonies and suffered prior strike convictions for burglary and robbery. In light of Rogers's serious current offenses and his recidivism, we cannot say imposition of a 25-year-to-life sentence under the Three Strikes law "either shocks the conscience or violates notions of human dignity. Rather, application of this law to [Rogers] results from the need to deter offenders, like him, who repeatedly commit

such crimes and to segregate them from the rest of society. This does not constitute cruel or unusual punishment." (*Id.* at pp. 400-401; see also *People v. Cooper* (1996) 43 Cal.App.4th 815, 820-828.)

Andrade, supra, 270 F.3d 743, does not compel a different result. While we respect the Ninth Circuit Court of Appeals, we disagree with the *Andrade* majority opinion's interpretation of the United States Supreme Court's teachings on the federal constitutional prohibition against cruel and unusual punishment. The *Andrade* dissenting opinion is correct. Further, in any event, this case is factually distinguishable from *Andrade*. The decision in *Andrade* did not invalidate California's Three Strikes law generally. Instead, the Ninth Circuit expressly concluded the Three Strikes law was "unconstitutional only as applied to Andrade because it imposes a sentence grossly disproportionate to his crimes." (*Id.* at p. 747.) Because Andrade had been convicted of several prior non-violent offenses, his petty thefts were enhanced to felonies under section 666 and then enhanced again to third and fourth strikes under the Three Strikes law. (*Andrade*, at p. 746.) "As a result, Andrade, a non-violent recidivist who twice shoplifted merchandise worth a total of \$153.54, received a life sentence in prison with no possibility of parole for 50 years." (*Ibid.*) Unlike defendant Andrade, Rogers received only one 25-year-to-life sentence under the Three Strikes law, not two. Moreover, unlike Andrade's two present petty thefts, Rogers's current gun possession crimes involved the threat of violence by a felon. Finally, unlike Andrade's non-violent prior offenses, Rogers's prior convictions included robbery.

In sum, Rogers has not demonstrated his sentence constituted cruel and unusual punishment.

H

Incorrect Abstract of Judgment

Rogers contends, and the People agree, that although the trial court ordered stays under section 654 on Rogers's sentences for possession of a firearm concealed within his vehicle and receipt of stolen property, the abstract of judgment does not so indicate. Hence, the abstract of judgment must be corrected to reflect those two stays. (*People v. Mitchell* (2001) 26 Cal.4th 181.)

III

DISPOSITION

The judgment is affirmed. The superior court is directed to amend the abstract of judgment to indicate the sentences for possession of a firearm concealed within a vehicle and receipt of stolen property are stayed under Penal Code section 654. The superior court is also directed to forward a certified copy of the amended abstract to the Department of Corrections.

KREMER, P. J.

WE CONCUR:

BENKE, J.

O'ROURKE, J.